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IN THE

Supreme Court of the United States

October Term, 1997

LOVILIA COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,
Petitioners,

v.

WESLEY HARVEY and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For the Eighth Circuit

BRIEF OF AMICUS CURIAE ASSOCIATION OF BITUMINOUS CONTRACTORS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed in support of the petition for writ of certiorari.[1] The Association of Bituminous Contractors, Inc. ("ABC") is a multiemployer association of independent and general contractors who perform various types of construction work for coal company customers. ABC's member companies engage in shaft and slope

[1] Pursuant to Supreme Court Rule 37.2, this brief is filed with the written consents of the parties which are filed concurrently herewith.

construction, the construction of structures such as preparation plants, road construction and electrical work at both existing and future coal mine sites.

The Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945, employs certain definitions as terms of art to identify the class of individuals potentially eligible for black lung benefits. Construction workers do not engage in the usual tasks associated with the mining of coal, that is the extraction and preparation of coal for commercial use. However, for purposes of the Act, the definition of "miner" encompasses construction workers to the extent that they are exposed to coal dust as a consequence of their work in coal mine construction. 30 U.S.C. § 902(b). Defined as "miners" under these circumstances, employees of ABC member companies are entitled to black lung benefits if they become totally disabled due to pneumoconiosis. Survivors of such employees whose death was due to pneumoconiosis are also entitled to benefits.

Where an award is made, benefits for a claim are paid either by a "responsible operator" within the meaning of the Act and the implementing regulations, or, in the absence of a responsible operator, by the Black Lung Disability Trust Fund. 20 C.F.R. §§ 725.492, 725.493. The regulations provide that only one operator is responsible for the payment of a particular employee's benefits. If an employee had multiple employers, liability is assessed against the most recent employer for whom the employee worked at least one year as a "miner." 20 C.F.R. § 725.493(a) (1).

Since the passage of the 1978 amendments to the Act, ABC's member companies have been named as potentially liable "responsible operators" in cases filed by approximately 500 claimants. The resolution of the issues presented in the petition concerning the legal standards which should be applied in the adjudication of duplicate claim filings will have an impact on both pending and new duplicate claim filings by any of these 500 claimants. Moreover, the impact will extend beyond this group if ABC members are newly named as

potentially liable parties in duplicate claim filings by heretofore unknown claimants. The identity of such claimants cannot be ascertained, but ABC believes their number may be significant given the Department's policies for determining potentially liable responsible operators under its most-recent-year-of-employment regulation.

ABC's members are geographically dispersed, engaging in construction projects at locations throughout the United States. Currently, diverse standards are applied in the adjudication of duplicate black lung claims in the various judicial circuits. ABC supports the petitioner in urging the Court to establish uniform standards to be applied in adjudicating duplicate claims.

SUMMARY OF ARGUMENT

Awards should be made on duplicate federal black lung claims only where a previously denied claimant can make a meaningful showing of a deterioration in health attributable to pneumoconiosis, that is a "material change in condition." Allowing readjudication of duplicate claims is an exception to the usual rule of judicial finality, and one which must be construed to limit the availability of new evaluations of previously denied claims. The Department of Labor has improperly taken the position that something less than a meaningful showing of deterioration in health is sufficient to overcome the bar of finality. The Department's position rests on the theory that pneumoconiosis can be presumed to progress in all cases, thereby allowing a finding of "material change" without affirmative proof of an actual worsening of health due to black lung disease.

As applied to construction contractors, the Labor Department's theory of progressivity is wholly specious. The provisions under which a construction contractor can be held liable are supposed to limit awards to cases involving dust exposure comparable to that experienced by actual coal miners. Because of the way the determination of dust exposure is made, however, it is possible for a construction

worker with no dust exposure to maintain a claim. The net result is that a claimant can avail himself of the presumption of progressivity in duplicate claims even where there may have been no dust exposure before, during, or after his employment. Even if such an individual is highly unlikely to prevail on the merits of his claim, the absence of finality forces the named "responsible operator" to defend claims which should never be allowed to go forward.

Because the Department's liberal reopening policy leads to full adjudication of duplicate claims filed many years after employment ceased, it effectively undermines the right of construction companies to contest the Department's responsible operator designation. In order to mount an effective defense, a construction contractor must produce highly specific evidence of the actual day-to-day dust conditions encountered by a claimant. Such evidence becomes increasingly more difficult to muster with each passing year. Requiring a construction contractor to develop its evidence in the first instance in connection with a duplicate claim filed long after employment ceased improperly ignores the parties' reasonable expectation of finality.

ARGUMENT

I. The irrationality of the Department of Labor's theory of "material change" is starkly presented in the case of construction workers who are not exposed to the conditions giving rise to black lung disease.

The Department's regulations impose a threshold requirement for adjudication of so-called duplicate claims, requiring that they be denied on the basis of the previous denial of a claim unless a "material change in conditions" can be shown. 20 C.F.R. § 725.309(c), (d). This is an exception to the general rule that final adjudications should not be reconsidered, and reflects the Department's judgment that a new evaluation of a previously denied black lung claim should be permissible in certain cases. Necessarily, the class

of cases which are subject to this exceptional treatment should be limited. Federal black lung claims are subject to the usual constraints of res judicata, and previously denied black lung claims should be reopened and reevaluated only in those instances where the claimant in question can affirmatively demonstrate a deterioration in health due to black lung disease.

As described by petitioner, the Department of Labor has improperly developed a burden-shifting scheme unsupported by legal authority or valid medical science that allows unsuccessful claimants to pursue awards without having to make a meaningful showing in connection with a duplicate claim. To justify this result, the Labor Department relies on the dogma that pneumoconiosis is a progressive disease even in the absence of dust exposure. This leaves the way clear for an endless series of reopenings, which is totally at odds with applicable principles of finality.

The relevant legal context and the current state of the law are fully presented in the petition and demonstrate why the Labor Department's theory is an unacceptable way to approach duplicate claims adjudication. The application of this theory leads to especially irrational results in the cases of many construction workers where there is no evidence that they were ever exposed to coal mine dust in the first place.

Coal mine construction work frequently involves limited, or no, dust exposure. Workers who may be erecting new structures or otherwise preparing a site for future coal mining operations simply do not encounter the type of conditions giving rise to black lung disease that were the genesis of the federal black lung program. Congress accordingly included provisions in the Act to address these special circumstances. As explained in the report of the Senate Committee on Human Resources:

> The term [miner] includes coal mine construction workers when they work in conditions *substantially similar to conditions in underground coal mines.*

S. Rep. No. 95-209, 95th Cong. 1st Sess. 20 (May 16, 1977) (reprinted in the Legislative History of the Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 p. 624) (emphasis added).

It is for this reason that Congress limited the circumstances under which construction companies may be held liable under the Act. Only to the extent a construction worker is employed under conditions which may cause black lung disease, that is, to the extent he or she is exposed to coal dust, is a construction worker a "miner" for purposes of the Black Lung Act. 30 U.S.C. § 902(b); 20 C.F.R. § 725.491(c) (1) (construction contractors may be held liable for the payment of benefits only with respect to their employees "who work or have worked . . . in coal mine construction in any period during which such employees were exposed to coal dust during their employment with such contractor").

Despite the express concern of Congress with viewing construction workers as miners only to the extent they are exposed to conditions like those found in underground mining, the Department's implementing regulations approach the issue from a different perspective.[2] For purposes of determining whether a worker was exposed to coal dust, the Department employs a burden-shifting presumption that requires a construction contractor to *disprove* the existence of conditions which are similar to those found in mining. Specifically, there is a rebuttable presumption that an individual was regularly and continuously exposed to coal dust during the course of employment by the construction contractor. 20 C.F.R. § 725.492(c). The regulations specify that this presumption may be rebutted by showing that the employee was not regularly exposed to coal mine dust during his or her employment in or

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[2] In responding to comments concerning the proposed regulations, the Department took the position that statutory authority does not limit the coverage of construction employees only to situations in which there is exposure to dust conditions substantially similar to those encountered in underground mining. 43 Fed. Reg. 36,778 (1978).

around a coal mine or preparation facility. 20 C.F.R. § 725.202(a)(1).

Under this burden-shifting approach, there need be no affirmative proof whatsoever that a construction worker was exposed to dust conditions comparable to coal mining in order for the worker to be considered a "miner" potentially eligible for black lung benefits. Rather, the determination rests on the sufficiency of the employer's evidence to refute the existence of regular exposure to coal mine dust. Furthermore, in applying the regulations, the Department has taken the extreme position that rebuttal must be denied absent evidence addressing each and every moment the claimant was employed. *See Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990) (evidence concerning generally clean conditions legally insufficient to meet the employer's burden of proof). Once the dust exposure issue is thus reduced to an evidentiary question heavily skewed against a negative finding, the resolution of the issue may, but will likely not, reflect on the actual dust conditions under which the worker was employed.

As a result, there is no reason to presume in any construction worker case that the claimant was exposed to dust conditions which would support, or even suggest the possibility of, a potential future impact on his health. Many cases simply rest on the contractor's inability to muster the quantum of proof necessary to disprove exposure. Therefore, given this setting, to throw open the case for full readjudication based on anything less than an affirmative showing by the claimant of a material change in condition is completely unfounded and irrational.

II. Because of the special circumstances under which construction companies can be held liable as "responsible operators" under the Act, they are at a particular disadvantage when forced to defend previously denied claims long after employment with the company ceased.

Oftentimes a determination of responsible operator status is not made when a claim is denied on medical grounds because where no award is made, there is no need to decide who should pay. In this setting, lack of finality is particularly prejudicial to construction contractors who, because of the passage of time, may not be able to locate and develop evidence needed to refute their operator status when the claim is readjudicated as a duplicate claim many years later.

Delayed adjudication potentially affects all named "operators" who must defend themselves long after the claims process was initially commenced. In the case of construction companies, however, the absence of finality has particularly adverse consequences because of the special circumstances which apply to the determination of their "responsible operator" status. As a practical matter, the disregard for finality in adjudications prevents construction companies from presenting the fundamental defense Congress provided, namely that the individual was not a "miner" while employed by the construction company.

While the most-recent-year-of-employment rule of liability would tend to suggest that the "responsible operator" determination is being made as close as possible in time to the cessation of employment, this is frequently not so where construction employment is involved. Because of the transitory nature of construction jobs, many construction workers are employed on-and-off by numerous employers during their lifetimes. To be named as the "responsible operator," a construction company need only have employed an individual for one year (either at one time or for cumulative periods adding up to a year) at some point during his lifetime. Depending on the individual's work history, the

named construction company might have last employed the individual many years before he ceased working for good. This situation arises when none of the employee's more recent employers meet the one-year requirement, a common occurrence in construction employment.

In light of the burden imposed on construction companies to *disprove* dust exposure, they are at a particular disadvantage when claims are not adjudicated within a reasonable period after the cessation of employment. Ten, fifteen or twenty years after a worker left the employment of a construction company it may be impossible for relevant evidence to be developed on the dust exposure issue. Even if there was *no* dust exposure, the passage of time alone may prevent rebuttal of the presumption of exposure because witnesses or documents are no longer available.[3] The consequence of this delay is that a construction company who should not be liable cannot overcome the Department of Labor's designation as a potentially liable party.

It may seem that the problems of proof associated with delayed adjudications of the responsible operator issue are generally present in all black lung claims and are not associated with construction worker claims in particular. The difference is that there may be historical employment information created for other purposes that will resolve a mining company's status, but there is no such information to resolve a construction company's status. Where the fact and length of employment are the basic issues, it is often possible to rely on Social Security Administration earnings records or other usual business records to establish the necessary employment history, even years later. Since employment only is the basis for responsible operator designation in the usual

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[3] The petitioner, for example, presents a case where the first black lung claim was filed in 1973, the fifth claim was filed in 1990, and no award was made until 1993. In a similar situation involving a construction company, the employer would have to present evidence on the extent of dust exposure in the first instance approximately twenty years after employment ceased.

mining company setting, later adjudications do not present insurmountable hurdles, at least in theory.[4]

By contrast, there will seldom be business records or historical documents, created for other purposes, that address the dust exposure issue. When presented with an award in the first instance years after a denial, the construction employer faces the prospect of finding documentation of the projects at which the claimant was employed (which probably were concluded at the same time or shortly after the claimant ceased working); witnesses who are familiar with those projects (usually employees who were employed at the same time and place as the claimant); and recreating the setting of the claimant's employment. Doing this for construction projects which ended years before will be possible in only the rarest of cases. The failure to give force and effect to the normal concepts of finality which should be applied in federal black lung cases thus has the unanticipated and unjustifiable consequence of holding construction contractors liable in cases where they should not be.

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[4] Under the regulations, an individual employed by a coal mine operator is considered to be a miner regardless of the dust conditions encountered in his or her work. 20 C.F.R. § 725.202(a).

CONCLUSION

For the reasons stated above, ABC urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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